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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 MANUEL FELIX, JR., ) Case No. CV 11-7713-JHN (RNB)  
12 Petitioner, )  
13 vs. ) ORDER TO SHOW CAUSE  
14 DOMINGO URIBE, JR., )  
15 Warden, )  
16 Respondent. )

17 On September 16, 2011, petitioner (through counsel) filed a Petition for Writ  
18 of Habeas Corpus by a Person in State Custody herein. The Petition purports to state  
19 seven grounds for relief.

20 Under 28 U.S.C. § 2254(b), habeas relief may not be granted unless petitioner  
21 has exhausted the remedies available in the courts of the State.<sup>1</sup> Exhaustion requires  
22 that the prisoner's contentions be fairly presented to the state courts and be disposed  
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25 <sup>1</sup> The habeas statute now explicitly provides that a habeas petition brought  
26 by a person in state custody "shall not be granted unless it appears that-- (A) the  
27 applicant has exhausted the remedies available in the courts of the State; or (B)(i)  
28 there is an absence of available State corrective process; or (ii) circumstances exist  
that render such process ineffective to protect the rights of the applicant." 28 U.S.C.  
§ 2254(b)(1).

1 of on the merits by the highest court of the state. See James v. Borg, 24 F.3d 20, 24  
 2 (9th Cir.), cert. denied, 513 U.S. 935 (1994); Carothers v. Rhay, 594 F.2d 225, 228  
 3 (9th Cir. 1979). Moreover, a claim has not been fairly presented unless the prisoner  
 4 has described in the state court proceedings both the operative facts and the federal  
 5 legal theory on which his claim is based. See Duncan v. Henry, 513 U.S. 364, 365-66,  
 6 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995); Picard v. Connor, 404 U.S. 270, 275-78, 92  
 7 S. Ct. 509, 30 L. Ed. 2d 438 (1971). As a matter of comity, a federal court will not  
 8 entertain a habeas corpus petition unless the petitioner has exhausted the available  
 9 state judicial remedies on every ground presented in the petition. See Rose v. Lundy,  
 10 455 U.S. 509, 518-22, 102 S. Ct. 1198, 71 L. Ed. 2d 179 (1982). Petitioner has the  
 11 burden of demonstrating that he has exhausted available state remedies. See, e.g.,  
 12 Brown v. Cuyler, 669 F.2d 155, 158 (3d Cir. 1982). The Ninth Circuit has held that  
 13 a federal court may raise the failure to exhaust issue sua sponte and may summarily  
 14 dismiss on that ground. See Stone v. San Francisco, 968 F.2d 850, 856 (9th Cir.  
 15 1992), cert. denied, 506 U.S. 1081 (1993); Cartwright v. Cupp, 650 F.2d 1103, 1104  
 16 (9th Cir. 1982) (per curiam), cert. denied, 455 U.S. 1023 (1982); see also Granberry  
 17 v. Greer, 481 U.S. 129, 134-35, 107 S. Ct. 1671, 95 L. Ed. 2d 119 (1987).

18 Here, it appears from the face of the Petition that petitioner did not exhaust his  
 19 state remedies with respect to three of his four grounds for relief. Specifically, it  
 20 appears that Grounds Two through Four were presented for the first time in a habeas  
 21 petition to the California Supreme Court that still remains pending.

22 Accordingly, petitioner's inclusion of Grounds Two through Four in the  
 23 Petition renders the Petition a "mixed petition" containing both exhausted and  
 24 unexhausted claims. If it were clear here that petitioner's unexhausted claims were  
 25 procedurally barred under state law, then the exhaustion requirement would be  
 26 satisfied. See Castille v. Peoples, 489 U.S. 346, 351-52, 109 S. Ct. 1056, 103 L. Ed.  
 27 2d 380 (1989); Johnson v. Zenon, 88 F.3d 828, 831 (9th Cir. 1996); Jennison v.  
 28 Goldsmith, 940 F.2d 1308, 1312 (9th Cir. 1991). However, it is not "clear" here that

1 the California Supreme Court will hold that petitioner's unexhausted claims are  
2 procedurally barred under state law when it rules on petitioner's pending habeas  
3 petition (which being an original proceeding is not subject to the same timeliness  
4 requirement as a Petition for Review of a Court of Appeal decision). See, e.g., In re  
5 Harris, 5 Cal. 4th 813, 825, 21 Cal. Rptr. 2d 373, 855 P.2d 391 (1993) (granting  
6 habeas relief where petitioner claiming sentencing error, even though the alleged  
7 sentencing error could have been raised on direct appeal); People v. Sorensen, 111  
8 Cal. App. 2d 404, 405, 244 P.2d 734 (1952) (noting that claims that fundamental  
9 constitutional rights have been violated may be raised by state habeas petition). The  
10 Court therefore concludes that this is not an appropriate case for invocation of either  
11 statutory "exception" to the requirement that a petitioner's federal claims must first  
12 be fairly presented to and disposed of on the merits by the state's highest court. See  
13 28 U.S.C. § 2254(b)(1)(B).

14 Under the total exhaustion rule, if even one of the claims being alleged by a  
15 habeas petitioner is unexhausted, the petition must be dismissed. See Rose, 455 U.S.  
16 at 522; see also Coleman v. Thompson, 501 U.S. 722, 731, 115 S. Ct. 2546, 115 L.  
17 Ed. 2d 640 (1991); Castille, 489 U.S. at 349. However, more recently, the Supreme  
18 Court held in Rhines v. Weber, 544 U.S. 269, 277, 125 S. Ct. 1528, 161 L. Ed. 2d 440  
19 (2005) that, in certain "limited circumstances," a district court may stay a mixed  
20 petition and hold it in abeyance while the petitioner returns to state court to exhaust  
21 his unexhausted claims. Under Rhines, the prerequisites for obtaining a stay while the  
22 petitioner exhausts his state remedies are: (1) that the petitioner show good cause for  
23 his failure to exhaust his claims first in state court; (2) that the unexhausted claims not  
24 be "plainly meritless"; and (3) that petitioner not have engaged in "abusive litigation  
25 tactics or intentional delay." See id. at 277-78. Here, although petitioner has  
26 requested in the "Conclusion" section of the Petition that the Court "stay its action on  
27 this petition with [sic] such time as the California Supreme Court has taken final  
28 action on the federal claims raised by the state habeas petition," he has not even

1 purported to make the three necessary showings under Rhines.

2 Per Rhines, where the petitioner has presented the district court with a mixed  
3 petition and the Court determines that stay and abeyance is inappropriate, the district  
4 court must “allow the petitioner to delete the unexhausted claims and to proceed with  
5 the exhausted claims if dismissal of the entire petition would unreasonably impair the  
6 petitioner’s right to obtain federal relief.” See Rhines, 544 U.S. at 278. Here,  
7 however, it appears to the Court that the option of allowing petitioner to delete his  
8 unexhausted claims and proceed with his one exhausted claim is not available based  
9 on the Ninth Circuit’s holding and reasoning in Sherwood v. Tompkins, 716 F.2d 632  
10 (9th Cir. 1983). In Sherwood, the petitioner was seeking habeas relief on the ground  
11 that he had been denied his right to appointed counsel and free transcripts. Although  
12 the petitioner’s state appeal from his conviction still was pending, the petitioner  
13 arguably had exhausted his state remedies with respect to the particular claim being  
14 raised in his federal habeas petition. The Ninth Circuit held that the federal habeas  
15 petition nevertheless had to be dismissed for failure to exhaust state remedies:

16 “[E]ven were Sherwood to have exhausted all his state remedies  
17 with respect to the denial of his appointed counsel and free transcript  
18 request, that would not be enough to satisfy the requirements of 28  
19 U.S.C. §§ 2254(b) and (c). When, as in the present case, an appeal of a  
20 state criminal conviction is pending, a would-be habeas corpus petitioner  
21 must await the outcome of his appeal before his state remedies are  
22 exhausted, even where the issue to be challenged in the writ of habeas  
23 corpus has been finally settled in the state courts.

24 As we explained in Davidson v. Klinger, 411 F.2d 746, 747 (9th  
25 Cir. 1969), even if the federal constitutional question raised by the  
26 habeas corpus petitioner cannot be resolved in a pending state appeal,  
27 that appeal may result in the reversal of the petitioner’s conviction on  
28 some other ground, thereby mootng the federal question.” Sherwood,

1 716 F.2d at 634 (footnote and remaining citations omitted).

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3 Other courts in this Circuit also have applied the Sherwood dismissal rule where  
4 the petitioner had a state habeas petition pending. See, e.g., Henderson v. Cavazos,  
5 2011 WL 333232, \*1 (C.D. Cal. Jan. 31, 2011); Guerra v. Small, 2010 WL 703072,  
6 \*1 (N.D. Cal. Feb. 25, 2010); Lockhart v. Hedgpeth, 2008 WL 2260674, \*\*1 (N.D.  
7 Cal. May 30, 2008); Craft v. Sisko, 2008 WL 906438, \*1-\*2 (C.D. Cal. Apr. 1, 2008);  
8 McDade v. Board of Corrections, 2007 WL 3146736, \*1 (N.D. Cal. Oct. 25, 2007);  
9 Hancock v. Marshall, 2007 WL 1521002, \*1 (N.D. Cal. May 24, 2007); Kilgore v.  
10 Malfi, 2007 WL 1471293, \*2-\*3 (N.D. Cal. May 17, 2007).

11 IT THEREFORE IS ORDERED that, on or before **October 10, 2011**, petitioner  
12 either (a) file a formal stay-and-abeyance motion if he believes he can make the  
13 requisite showings; or (b) show cause in writing, if any he has, why the Court should  
14 not recommend that this action be dismissed without prejudice for failure to exhaust  
15 state remedies.

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17 DATED: September 22, 2011



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20 ROBERT N. BLOCK  
UNITED STATES MAGISTRATE JUDGE  
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